

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEPHEN M. SMITH)	
Claimant)	
VS.)	
)	Docket No. 227,363
SMITH & SMITH)	
Respondent)	
AND)	
)	
CIGNA)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

The respondent and its insurance carrier appealed the January 4, 1999 Award and January 5, 1999 Nunc Pro Tunc Award both entered by Administrative Law Judge Brad E. Avery. The Appeals Board heard oral argument on July 27, 1999.

APPEARANCES

Beth R. Foerster of Topeka, Kansas, appeared for the claimant. Gary R. Terrill of Overland Park, Kansas, appeared for the respondent and its insurance carrier. David Berkowitz of Lawrence, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award and in the Nunc Pro Tunc Award.

The respondent and its insurance carrier initially challenged the Judge's finding that claimant sustained personal injury by accident arising out of and in the course of his employment. But by letter dated August 2, 1999, they advised the Appeals Board that was no longer an issue in this appeal.

ISSUES

This is a claim for a June 3, 1994 accident and resulting back injury. Averaging an 11 percent task loss with an 85 percent loss in pre- and post-injury net profits in the company in which claimant was self-employed on the date of the accident, Judge Avery determined that claimant had a 48 percent permanent partial general disability. Because an earlier back injury and resulting permanent impairment was factored out and did not contribute to the permanent partial general disability caused by the June 1994 accident, the Judge found that claimant's award should not be reduced by either preexisting impairment¹ or a previous workers compensation lump sum settlement.² The Judge also found that claimant's average weekly wage was \$1,012.81.

The respondent, its insurance carrier, and the Workers Compensation Fund contend the Judge erred by finding that (1) claimant sustained any work disability, (2) claimant sustained any task loss as a result of the June 1994 accident, (3) claimant sustained any wage or earnings loss as a result of the 1994 accident, and (4) claimant was entitled to more than 10 weeks of temporary total disability benefits. Additionally, they contend the Judge erred by failing to reduce the award for a preexisting 10 percent whole body functional impairment and by failing to apply a credit in the sum of \$186.32 per week for the earlier lump sum settlement.

The respondent, its insurance carrier, and the Fund argue that claimant did not receive any additional restrictions after the 1994 accident and, therefore, he did not sustain any task or wage loss as a result of that alleged incident. Also, they contend claimant failed to prove how much of the decrease in business income resulted from his June 1994 injuries as distinguished from how much resulted from a change in business operations. Additionally, they argue that claimant failed to prove that his alleged increased subcontracting expense was related to the June 1994 accident rather than a 1991 back injury. Further, they argue claimant returned to light duty work doing bookkeeping and desk work long before he was released by his doctor and, therefore, his temporary total disability benefits should be limited to approximately 10 weeks following the February 1995 back surgery. Finally, they argue that any award should be reduced by both a preexisting functional impairment and a credit for a previous award.

Conversely, claimant argues that Judge Avery's findings should be affirmed. He argues that a post-injury wage should not be imputed because he has returned to work for his company with accommodations as the company now focuses upon manufacturing and selling ceramic tile instead of selling and installing carpet and vinyl flooring. Also, claimant argues that his task loss is greater than that found by the Judge. Additionally, he argues

¹ See K.S.A. 44-501(c).

² See K.S.A. 44-510a.

that none of his permanent partial general disability is attributable to the 1991 back injury and, therefore, the Judge correctly declined to reduce the award for preexisting impairment. Finally, he argues that the evidence failed to prove any contribution between the 1991 and 1994 disabilities and, therefore, the credit for an earlier award of workers compensation benefits is not applicable.

The issues before the Appeals Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. What is claimant's average weekly wage?
3. Was there an overpayment of temporary total disability benefits?
4. Should the award be reduced for a preexisting impairment pursuant to K.S.A. 44-501(c)?
5. Should the weekly benefits be reduced because of an earlier workers compensation award pursuant to K.S.A. 44-510a?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. The claimant, Stephen M. Smith, is self-employed and owns and operates Smith & Smith as a sole proprietorship. The company installs floor coverings and manufactures ceramic tiles.
2. On June 3, 1994, Mr. Smith injured his low back while twisting and lifting a bucket of grout. After a period of conservative treatment, Mr. Smith underwent back surgery.
3. Orthopedic surgeon Mark Bernhardt, M.D., began treating Mr. Smith for this injury in October 1994. In February 1995, the doctor performed laminectomies and discectomies between the fourth and fifth lumbar and between the fifth lumbar and first sacral intervertebral spaces. He then did a two-level fusion of those same vertebrae.
4. Before the June 1994 accident, Mr. Smith had a 10 percent whole body functional impairment. After the 1994 accident and related back surgery, Mr. Smith has an additional 9 percent whole body functional impairment according to the revised third edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides). Those findings are based upon the testimony and opinions of Dr. P. Brent Koprivica, who testified on behalf of the insurance carrier. The Board is mindful that Dr. Bernhardt testified that Mr. Smith had an additional 10 percent whole body functional impairment as a result of this accident but that opinion was not based upon the AMA

Guides. Instead, Dr. Bernhardt used the Manual for Orthopaedic Surgeons in Evaluating Permanent Physical Impairment as a general guide.

5. In the 15-year period before the June 1994 accident, Mr. Smith had performed 19 different job tasks as identified by vocational rehabilitation counselor Dick Santner. Following the June 1994 accident, Mr. Smith is now unable to perform 9 of 19, or approximately 47 percent, of those tasks. But before the 1994 accident, Mr. Smith had already lost the ability to do 8 of those 19 tasks. Those findings are based on Dr. Bernhardt's testimony.

6. Before the June 1994 injury, Mr. Smith could install vinyl flooring and ceramic tile. Now, because of that injury, he cannot. In determining the monetary loss that Mr. Smith sustained as a result of the June 1994 accident, the Appeals Board would prefer comparing the pre- and post-injury withdrawals that Mr. Smith received from his company. The Appeals Board believes that comparison best quantifies the economic loss that Mr. Smith sustained as a result of his accident. Unfortunately, the record does not contain sufficient evidence to compare the pre- and post-injury withdrawals. Therefore, the Board must attempt to determine Mr. Smith's "wage" loss in the fairest manner possible with the evidence available. In the 26-week period before the June 1994 accident, Mr. Smith's business operations made \$26,333, or an average of \$1,012.81 per week, in net profits. That is the only evidence available for determining a pre-injury average weekly wage. Therefore, the Appeals Board affirms the Judge's finding that Mr. Smith's pre-injury average weekly wage was \$1,012.81.

7. Averaging three years of net income (from 1994 through 1996), the Judge found that Mr. Smith's post-injury net profits averaged \$151.10 per week. Using that figure, the Judge found that Mr. Smith had an 85 percent difference in pre- and post-injury net profits. The Appeals Board affirms that finding.

8. The Judge found that Mr. Smith was entitled to receive temporary total disability benefits from October 18, 1994, through April 25, 1996. The Appeals Board affirms that finding. As indicated by Dr. Bernhardt, Mr. Smith's return to work date should be considered to be April 25, 1996, the date that the doctor wrote a letter stating that Mr. Smith had reached maximum medical improvement and was ready for a rating and final release. That letter also contains Mr. Smith's permanent work restrictions and final functional impairment rating. Although Mr. Smith did some work for his company before April 25, 1996, the Appeals Board finds that the work performed was very limited in nature and it did not constitute substantial and gainful employment.

9. As a result of a 1991 back injury, Mr. Smith received over \$11,000 in temporary total disability benefits and \$70,000 in a lump sum settlement award, which represented both permanent partial general disability benefits and vocational rehabilitation benefits. Additionally, the settlement required Mr. Smith to forfeit his right to request additional medical benefits or review and modification of his award should his condition ever worsen.

At the June 25, 1992 Settlement Hearing the terms of the settlement were stated as follows:

(Mr. Buck) The basis of the settlement is a strict compromise of all issues in the case upon the payment of \$70,000 in a lump sum to the claimant, including nature and extent of disability, past and future medical, vocational rehabilitation. I might add that I believe Mr. Smith went through the process of vocational rehabilitation. Claimant and all other parties waive the right to review and modification. . . . However, we would be settling any claims that claimant might possibly have against the Workers' Compensation Fund.

The settlement worksheet indicates that the \$70,000 lump sum payment was presented to compromise and to settle the following issues:

- “(a) Nature and extent of disability.
- (b) Arose out of and in the course of.
- (c) Past and future medical.
- (d) Past and future compensation.
- (e) Vocational Rehabilitation.
- (f) All issues.
- (g) Both parties waive their rights to review and modification.
- (h) Claimant waives his right to a 20-day statutory notice of hearing.
- (i) Respondent, Insurance Carrier expressly reserve all rights and claims against the Kansas Workers' Compensation Fund and the potential liability of the Kansas Workers' Compensation Fund to Respondent, Insurance Carrier is not being settled.”

CONCLUSIONS OF LAW

1. The Award and the Nunc Pro Tunc Award should be modified.
2. Mr. Smith injured his back on June 3, 1994. The accident arose out of and in the course of his self-employment.
3. As a result of the June 1994 accident and related surgery, Mr. Smith sustained an additional 9 percent whole body functional impairment. At the time of Mr. Smith's accident, the Workers Compensation Act defined functional impairment as that which was based upon the revised third edition of the AMA Guides. The appropriate version of the Act provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year

period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. **Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines [Guides] for [to] the Evaluation of Physical [Permanent] Impairment, if the impairment is contained therein. . . .**³ (Emphasis added.)

4. In defining permanent partial general disability, K.S.A. 44-510e is silent as to the treatment of preexisting impairment and medical restrictions. But in other sections the Workers Compensation Act provides that an award should be reduced by the amount of functional impairment determined to be preexisting.⁴

The issue of whether one analyzes task loss by considering all of the work tasks that a worker performed in the 15-year period before his or her work-related accident or by considering only those that remained after factoring in the preexisting medical restrictions goes to the basic question of whether Kansas is a “full disability” or “apportionment” state. In this case the difference is whether Mr. Smith’s task list is comprised of 11 or 19 work tasks.⁵

Before the 1993 legislative changes, Kansas was a full disability state as an employer was responsible for the full extent of the resulting disability sustained by an injured worker instead of only the proportion of a disability caused by a new injury. The Workers Compensation Fund then reimbursed the employer the proportion the preexisting impairment contributed to the ultimate disability.

The risk of employing a workman with a pre-existing disability is upon the employer, and when a workman who is not in sound health is accepted for employment and a subsequent industrial injury aggravates his condition,

³ K.S.A. 44-510e.

⁴ K.S.A. 44-501(c).

⁵ Because of the 1991 back injury, Mr. Smith lost the ability to do 8 of 19 tasks leaving him with the ability to do only 11 tasks immediately before the 1994 accident.

resulting in disability, he is entitled to be fully compensated for the resultant disability.⁶

Absent a statute to the contrary, where a workman's disability arises out of and in the course of his employment, there can be no reduction or prorating of the disability due to the accident itself and that due to [an] employee's pre-existing physical condition.⁷

A previous permanent partial disability award does not affect the right of a worker to receive permanent disability benefits for a subsequent injury.⁸

Where a preexisting condition is aggravated or accelerated by an injury, it is error to apportion an award between the disability resulting from the injury and the disability resulting from a preexisting condition.⁹

By amending the Workers Compensation Act to provide that preexisting functional impairment is to be subtracted from an award, the Appeals Board believes that the legislature did not intend to change Kansas' status to an "apportionment" state but instead created a hybrid where the ultimate disability is reduced to account for the preexisting functional impairment.

5. Based upon the above, the Appeals Board concludes that Mr. Smith has a 47 percent task loss following the June 1994 accident.

6. As indicated in the permanent partial general disability formula quoted above, the percentage difference in pre- and post-injury wages is to be averaged with the percentage of task loss to produce the permanent partial general disability. Because Mr. Smith is self-employed, the percentage difference in the pre- and post-injury net business profits is used. Averaging the 47 percent task loss with the 85 percent loss in net profits yields a 66 percent permanent partial general disability.

7. Mr. Smith is entitled to receive temporary total disability benefits from October 18, 1994, through April 25, 1996.

⁶ Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978); also see, Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

⁷ Poehlman v. Leydig, 194 Kan. 649, 400 P.2d 724 (1965).

⁸ Hampton v. Professional Security Co., 5 Kan. App. 2d 39, 611 P.2d 173 (1980).

⁹ Claphan v. Great Bend Manor, 5 Kan. App. 2d 47, 611 P.2d 180 (1980), *rev. denied* 228 Kan. 806 (1980).

8. As indicated above, the Workers Compensation Act provides that an award of compensation is to be reduced by the amount of preexisting functional impairment. The Act reads:

. . . The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.¹⁰

As indicated in the findings above, Mr. Smith had a preexisting 10 percent whole body functional impairment due to his low back. Therefore, the 66 percent permanent partial general disability is reduced by the preexisting 10 percent functional impairment for an award based on 56 percent.

9. The Judge did not err by declining to apply a credit pursuant to K.S.A. 44-510a. That statute reads:

(a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. . . .

10. In this instance, the credit from the above quoted statute cannot be applied. Reviewing the terms of the settlement, it is not possible to determine what portion of the \$70,000 lump sum settlement that Mr. Smith received in 1992 was paid to compensate him for his permanent partial disability versus the portion that was paid in exchange for waiving his rights to request additional medical benefits, vocational rehabilitation benefits, and review and modification. Neither the settlement hearing transcript nor the settlement worksheet specify the percentage of disability that the settlement represents.

11. The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with those made above.

¹⁰ K.S.A. 44-501(c).

AWARD

WHEREFORE, the Appeals Board modifies the January 4, 1999 Award and the January 5, 1999 Nunc Pro Tunc Award, as follows:

Stephen M. Smith is granted compensation from Smith & Smith and its insurance carrier for a June 3, 1994 accident and resulting 56 percent permanent partial general disability. Mr. Smith is entitled to receive 79.43 weeks of temporary total disability benefits at \$313 per week, or \$24,861.59, followed by 196.32 weeks of permanent partial disability benefits at \$313 per week, or \$61,448.16, for a 56 percent permanent partial general disability and making a total award of \$86,309.75, which is all due and owing less any amounts previously paid.

The Appeals Board adopts the remaining orders to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

I respectfully disagree with the majority’s method in determining the “wage loss” percentage for the permanent partial disability formula.

Treating net business profits as wages, the majority compared pre- and post-injury profits and determined that Mr. Smith had an 85 percent wage loss. But net business profits are not the equivalent of wages and, therefore, the comparison in profits is not a meaningful measure of “wage” loss. Wages are the remuneration received by an individual for providing personal services. Conversely, profits are the gain received from a business undertaking and includes the return received from the property utilized in that enterprise. Wages are the amounts paid or the value of other items provided to the worker for services

rendered. But profits are the excess of receipts over expenses, both real and those recognized by accounting theory, and may not represent the cash flow created by the enterprise or the financial benefit derived by its owners. Additionally, profits may be manipulated by accounting procedures and other decisions controlled by the owner. Those decisions affect not only the enterprise's net profit, but also its cash flow. This case is an excellent example where Mr. Smith's decision to pursue manufacturing ceramic tile, rather than the injury sustained, affected the company's profit margin.

The Workers Compensation Act does not provide a method for computing an individual's "wages" when that person is self-employed. But the Appeals Board has held that a self-employed individual's draws and other payments of personal expenses made on that person's behalf are an appropriate measure of the economic benefit flowing to the individual.¹¹ In my opinion, that is a much better measure of economic benefit and more equivalent to wages than net profits. The alternative is to analyze Mr. Smith's wage loss using a "prevailing wage" theory as was recently suggested in an unrelated, unpublished Kansas Court of Appeals decision. Under that theory, one would determine Mr. Smith's loss of ability to earn wages as a vinyl flooring and ceramic tile installer and use that percentage for the wage loss prong of the permanent partial general disability formula. Either of those two methods is better than pretending that net business profits and wages are equivalent.

Based upon the above, the proceeding should be remanded to the Judge for additional evidence to determine Mr. Smith's "wage loss" by either the withdrawal or prevailing wage theories.

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned respectfully dissents from the opinion of the majority regarding the claimant's loss of ability to perform the work tasks that the claimant performed during the 15 years preceding the accident. In the 15-year period before June 1994, claimant performed 19 different job tasks as identified by vocational rehabilitation counselor Dick Santner. However, of these 19 job tasks claimant had already lost the ability to perform 8 prior to the 1994 accident. From the June 1994 accident claimant lost 1 of 11 remaining job tasks for a 9 percent loss of task performing ability. The majority opinion in granting claimant a 47 percent job tasks loss has allowed claimant an entitlement to work disability benefits for the same job tasks loss from two separate accidents. Claimant's award in this matter should be limited to the loss of task performing ability suffered as a result of this

¹¹ Smith v. The Curling Iron, WCAB Docket No. 186,891 (August 1996).

accident. The majority opinion's award procedure would allow a claimant to collect work disability benefits for the same lost job tasks ad infinitum. This cannot be the intent of the legislature in creating this provision in the Workers Compensation Act.

I also disagree with the majority's holding that K.S.A. 44-510a is no longer good law. I agree that under certain circumstances K.S.A. 44-501(c) and K.S.A. 44-510a can overlap. But the decision to repeal K.S.A. 44-510a is a function reserved to the legislature.

BOARD MEMBER

c: Beth R. Foerster, Topeka, KS
Gary R. Terrill, Overland Park, KS
David Berkowitz, Lawrence, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director